

U.S. Department of
Homeland Security

United States
Coast Guard



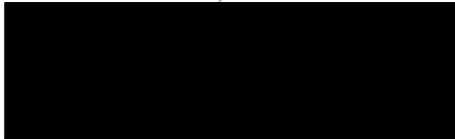
Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7010 0780 0001 8634 2302

5890/DWHZ
27 August 2013

Barnacle Seafood, Inc.



Re: Claim Number: N10036-1976

Dear Mr. Von Kahle:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1976 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request.

Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number N10036-1976.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,



Claims Adjudication Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1976
Claimant	Barnacle Seafood, Inc.
Type of Claimant	Corporate
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$4,748,033.15

FACTS

On or about 20 April 2010, the Mobile Offshore Drilling Unit Deepwater Horizon (Deepwater Horizon) exploded and sank in the Gulf of Mexico. As a result of the explosion and sinking, oil discharged. The Coast Guard designated the source of the discharge and identified BP as a responsible party (RP). BP accepted the designation and advertised its OPA claims process. On 23 August 2010, the Gulf Coast Claims Facility (GCCF) began accepting and adjudicating certain individual and business claims on behalf of BP.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 14 August 2013, Mr. Philip Von Kahle, the assignee for Barnacle Seafood, Inc. ("the Claimant"), submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$4,748,033.15 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant states it was a supplier of domestic wild-caught seafood. The Claimant alleges that, as a result, "no restaurant would purchase seafood fished out of the Gulf of Mexico" and that "[t]he business had to be closed and an Assignment for the Benefit of Creditors filed to distribute remaining assets to creditors."

APPLICABLE LAW

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

¹ Cover letter signed by Mr. Philip Von Kahle, dated 5 August 2013.

The OSLTF is available to pay claims for uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136. One type of damages available pursuant to 33 C.F.R. § 136.231 is a claim for loss of profits or impairment of earning capacity due to injury to or destruction of natural resources.

Under 33 C.F.R. § 136.233 a claimant must establish the following:

- (a) That real or personal property or natural resources have been injured, destroyed, or lost;
- (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of property or natural resources, and the amount of that reduction;
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established; and
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 C.F.R. § 136.235, the amount of compensation allowable for a claim involving loss of profits or impairment of earning capacity is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for—

- (a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertaken, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local, and Federal taxes.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring, by subrogation, all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the NPFC

The Claimant submitted the following documentation in support of this claim:

- Claim Cover Letter, 5 August 2013;
- Copy of the Certified Mail Return Receipt,

- BP Claims Program Claim Form, 22 June 2013;
- Notice of Assignment for the Benefit of Creditors, 13 May 2010;
- Assignment for the Benefit of Creditors, 5 May 2010
- Schedule A – Creditor List;
- Schedule B – List of Assets;
- Verification of Assignment and Schedules By Assignor, 5 May 2010;
- Acceptance by Assignee, 6 May 2010;
- Written Consent of Sole Shareholder and Board of Directors, 4 May 2010.

The Claimant alleged that this claim was first presented to the Responsible Party through the BP Claims Center and that the RP failed to pay or respond within 90 days.²

On 14 August 2013, the Claimant presented this claim to the NPFC, seeking to recover \$4,748,033.15 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill. The NPFC does not have evidence sufficient to establish the amount of damages previously presented to and denied by the BP Claims Center, as there is no correspondence from the RP or its representatives, but will adjudicate this claim to the extent that presentment requirements have been satisfied. If any damages now presented to the NPFC were not first presented to the RP or its agent, these damages are denied for improper presentment.³

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any loss of income was due to injury, destruction or loss of real or personal property or of a natural resource as a result of a discharge or substantial threat of a discharge of oil. Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the loss was caused by damage to real or personal property or natural resources caused by the discharge of oil during the Deepwater Horizon oil spill.

1. The Claimant has not provided documentation to show it lost work as a result of the spill.

This claim is based on the Claimant's interpretation that, as a result of the oil spill, its ability to sell its domestic wild-caught seafood was impaired, but it neither offered an explanation of how its business operated, how long its business was affected nor how it arrived at its \$4,748,033.15 claim total (if the SUM CERTAIN for this claim is based on the Accounts Payable enclosure to the Schedule A – Creditor List, then it would be \$1,148,033.15). As it stands, the Claimant did not provide any future or past contracts/sales records to show both comparables or actual lost contracts and/or sales. Without these, it cannot be determined that its claimed income loss was a result of the oil spill.

² Cover Letter, 5 August 2013.

³ 33 C.F.R. § 136.103(c)(2).

2. The Claimant has not provided documentation to show its claimed losses were a result of the spill.

Based on the Accounts Payable enclosure to the Schedule A – Creditor List, it appears that the Claimant was in financial strain well before the spill, with many costs listed as 30 days or more delinquent. Thus, the Claimant has failed to show the causation between the oil spill and the claimed losses. Additionally, it appears that these are operating costs and not lost contracts/jobs/income resulting from the spill

Based on the foregoing, this claim is denied because (1) the Claimant has failed to provide evidence sufficient to prove that it sustained a financial loss in the amount \$4,748,033.15, and (2) the Claimant has failed to prove that the alleged loss is due to the injury, destruction, or loss of property or natural resources as a result of a discharge or substantial threat of discharge of oil.

Claim Supervisor:  *NFFC Claims Adjudication Division*

Date of Supervisor's Review: *8/27/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: